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Antitrust Division

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Mr. John F. Fischer, Esquire
Andrews, Davis, Legg, Bixler, Milsten & Price
500 West Main
Oklahoma City, OK 73102-2275

Dear Mr. Fischer:

This letter responds to your request on behalf of Oklahoma Physicians Network-IPA, Inc. ("OPN") and PROklahoma Care, Inc. ("PROklahoma") for a statement, pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, of the Department's present enforcement intentions regarding OPN/PROklahoma's proposal to set up a health care provider network. For the reasons set forth below, the Department does not currently intend to challenge OPN/PROklahoma's proposed activities under the antitrust laws.

You have explained that OPN will be a statewide physician network, or independent practice association ("IPA"). You have also indicated that the initial membership of OPN will likely include under 1,000 participating physicians. As of mid-May, 1995, 916 physicians, in 51 of Oklahoma's 77 counties, had agreed to become OPN members.

PROklahoma will be a health maintenance organization ("HMO") capitalized by physicians in OPN.[1] Initially, the OPN network will contract with PROklahoma on a capitated basis. You have told us that, in the future, OPN may contract with other third-party payers on a fee-for-service basis with a "risk pool" or on a capitated basis. With the risk pool, OPN will negotiate utilization and cost containment goals with each of its network customers, and it will withhold 20% of each participating physician's billing. If the cost containment and utilization goals are not met, no physician will receive any withheld amount and the entire withhold fund

[1] Your initial plan called for PROklahoma to be capitalized with a $3,000 contribution by each OPN physician-member. You subsequently informed us that, due to lower than expected physician participation, PROklahoma would also sell additional stock to OPN physician-members.

will be returned by OPN to (or retained by) the payer. When OPN enters into a capitated fee arrangement with PROklahoma or any other payer, it will undertake the risk of providing medical coverage to such payers and distribute the proceeds to OPN's participating physicians.

Based on the information set forth above, it appears that the OPN network will be a bona fide joint venture in which the participating physicians will assume significant, shared financial risk for the achievement of specific cost-containment goals by the group. Thus, OPN's proposed provider network is not engaged in any *per se* illegal activity and will be analyzed, under the antitrust laws, pursuant to rule of reason analysis. *See* Statement 8 of the 1994 Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust ("Statement 8"). 4 Trade Reg. Rept. (CCH) ¶ 13,152 at p. 20,788.

You have represented that the OPN network will be a nonexclusive network. That is, participating physicians will be free to contract directly with other third party payers, or to participate in other provider-controlled and non-provider-controlled network organizations, without any requirement of notification to, or approval by, OPN. Moreover, you have represented that the vast majority of the physicians who are likely to participate in the OPN network already participate in competing non-provider-controlled networks, or contract directly with managed care plans, and you have stated that OPN expects its participating physicians to continue to do so at competitive rates. This suggests that the OPN network will be nonexclusive in practice, not just in name. *See* Id. (listing indicia of non-exclusivity).

When we assess a physician network joint venture under the rule of reason, our analysis focuses on whether the proposed network will create or facilitate the exercise of market power (the ability to impose supracompetitive prices or to prevent the formation of competing networks). Id at p. 20,789. As described in Statement 8, this analysis involves four steps: defining the relevant market, evaluating the competitive effect of the physician joint venture, evaluating the impact of procompetitive efficiencies and evaluating collateral agreements. Id.

You have not provided sufficient information from which we can ascertain precisely the relevant markets that will be involved in the operation of the OPN network. However, it is clear that most of the physicians participating in the network will compete in local markets that generally will be no larger than a single county and in some areas -- particularly urban centers -- will likely be smaller. You have submitted information about the numbers of physicians in particular medical specialties practicing in fifteen rural or semi-urban counties of the state. The conclusions in this letter assume that this information is accurate and, based on your representations, that these counties contain the majority of OPN's physicians in rural and semi-urban markets and most of the instances in which OPN has high percentages of physicians in certain specialties. Obviously, to the extent that actual percentages in appropriately defined relevant markets are higher than the information now before us discloses, our concerns about the proposed operations of the network might increase.

According to the information you submitted, OPN has a low percentage of primary physicians in the two urban parts of the state, including only 4% and 6% of the primary

physicians in Tulsa County and Oklahoma County, respectively, which are the largest population centers in the state.[2] Approximately 480 of OPN's physicians practice in Oklahoma County or in Tulsa County. Primary care participation is not as low in rural and semi-urban parts of the state, but it is generally below 30%. Where OPN's percentage of primary care physicians is below 30% in a properly defined market, it falls within the safety zone for non-exclusive joint ventures described in Statement 8. Id at 20,788.

Similarly, you claim that OPN has fewer than 30% of the physicians in most specialties in urban areas. Again, the safety zone of Statement 8 for non-exclusive joint ventures covers OPN's operations in any properly defined local market in which OPN has fewer than 30% of the physicians in each specialty. Id.

In a number of putative local markets in rural and semi-urban areas, however, OPN appears to have substantially more than 30% of the physicians in several specialties. In some of these, all of the physicians in specialties contracting with OPN already practice together in an integrated physician group. Since OPN's operations will not increase concentration in these specialties in these markets, OPN raises no concerns. For some putative local markets, however, OPN has more than 30% of the physicians in particular specialties, and the specialists do not practice together in a group. For example, OPN has 100% of the available otorhinolaryngologists in Lawton, Muskogee and Norman, and there are multiple otorhinolaryngologist practices in each of these areas. Substantial percentages of some specialties persist even when the possible market areas are broadened to include two or three counties.[3] In all, only about 10% of OPN's physicians are in specialties in putative local markets where OPN appears to exceed the safety zone provided in Statement 8.

The substantial percentage of physicians contracting with OPN in certain specialties in these markets raises the possibility that OPN could lead to the creation and exercise of market power in these specialties, particularly in view of the incipient state of HMOs and the limited number of other managed care organizations in many rural and semi-urban parts of Oklahoma. This is particularly the case in markets such as Norman and McAlester in which, some managed care payers have told us, physicians have been reluctant to participate in the payers' managed care networks.[4]

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[2] Roughly 1.2 million of Oklahoma's 3.1 million citizens live in Oklahoma County or in Tulsa County.

[3] Though we have not determined the boundaries of relevant local markets in various health care services in these areas, we have examined OPN's percentage of physicians in: arguably the smallest local markets in these areas (hospital staffs), intermediate local markets (counties) and large local markets (two to three county areas).

[4] We note, however, that most of OPN's physician-members in Norman appear to contract with at least three PPOs.

However, several factors allay our concerns that OPN will exercise market power in rural and semi-urban markets. First, OPN has been designed to be non-exclusive, and information you have provided suggests that OPN will be non-exclusive in fact. For example, many OPN physician-members contract with PPOs that have entered their markets. It also appears that, even after OPN is launched, its physicians will continue to earn substantial revenue from these PPOs and from other sources outside of the network.

Second, most of the instances in which a substantial percentage of a market's physicians are participating in OPN are in rural or semi-urban markets. Because of the small number of physicians that practice in these markets, it appears that OPN needs higher percentages of the limited number of physicians in some specialties in order to provide adequate choice and coverage to OPN customers.

Third, it does not appear that the overall structure of OPN will facilitate the exercise of market power. Thus, although physicians in urban areas and primary physicians in all areas are a majority of OPN's membership, these physicians constitute only small portions of the markets in which they participate. Consequently, these urban and primary physicians will have an incentive to ensure that OPN's physician services are priced competitively. This is likely to provide some counter to any incentives among OPN members in more rural areas to attempt to exercise market power and charge supracompetitive prices. This is particularly likely since the instances in which OPN physicians constitute a high percentage of the specialists in a local area do not appear to be concentrated in any particular specialty or geographic market.

For these reasons, the Department has no present intention to challenge the proposed operations of OPN or PROklahoma. However, this conclusion is based on our assumption that OPN and PROklahoma will operate in fact in the competitive manner described in this letter. Of course, we reserve the right to bring an enforcement action if the actual operation of OPN or PROklahoma proves anticompetitive in effect. For example, we would view the situation differently if OPN proved to be exclusive in practice and its members were able to raise prices to supracompetitive levels or prevent the entry of managed care plans into rural and semi-urban markets of Oklahoma. Similarly, we would be concerned if OPN, even though non-exclusive in practice, were to create or facilitate the exercise of market power in these markets, or if the activities of OPN or PROklahoma were to cause anticompetitive effects in any other manner.

This statement of the Department's enforcement intentions is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request, as supplemented, and this letter will be made available to the public immediately. Any supporting documents not deemed confidential pursuant to your request in accordance with Paragraph 10(c) of the Business Review Procedure will be publicly available within 30 days of the date of this letter.

Sincerely,

/S/

Anne K. Bingaman
Assistant Attorney General